SUPREME COURT, U. S.
OCT 9

Nos. 73-185, 73-186 and 73-5179

In the Supreme Court of the United States

OCTOBER TERM, 1973

ANNA BURNS, PETITIONER

v.

UNITED STATES OF AMERICA

PRENTISS MCCOLLUM AND ANNIE LOUISE WYCHE, PETITIONERS

v.

UNITED STATES OF AMERICA

FRANK JENKINS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The court of appeals rendered no opinion.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1973. The petitions for writs of certiorari in Nos. 73-185 and 73-186 were filed on July 26, 1973, and the petition in No. 73-5179 was filed on July 25, 1973.

QUESTIONS PRESENTED

1. Whether petitioners were prejudiced by the admission of evidence relating to counts dismissed by the court before sentencing (raised in Nos. 73-186 and 73-5179).

2. Whether the evidence showed multiple conspiracies rather than a single conspiracy (raised in Nos. 73-185 and 73-186).

3. Whether there was plain error in the trial court's instruction concerning knowledge by defendants that the vehicles in question had traveled in interstate commerce (raised in No. 73-185).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioners were convicted of conspiracy and (with the exception of petitioner Wyche) of substantive offenses involving interstate transportation, receipt and concealment of stolen motor vehicles, in violation of 18 U.S.C. 371, 2312 and 2313. Various sentences were imposed.[1] The court of appeals affirmed in a memorandum order without opinion (Pet. No. 73-186, App. A).

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[1] McCollum was sentenced to concurrent terms of imprisonment for five years, pursuant to 18 U.S.C. 4208(a)(1), on 14 substantive counts, and a fine of $5,000 and three years' probation for conspiracy, following service of his sentence on the substantive charges.

Jenkins received concurrent sentences of imprisonment for three years, pursuant to 18 U.S.C. 4208(a)(1), on eight substantive counts and a fine of $1,000 for conspiracy.

Co-defendant Vaden, who had pleaded guilty but had not yet been sentenced, testified as a government witness. According to Vaden's testimony, during the period of the conspiracy (September 25, 1969, to March 31, 1971) the basic pattern of operation was for petitioner McCollum to direct Vaden to steal a particular kind of car from the streets of New York City, which he would then do (Tr. 58, 63-68, 84). Following delivery of the stolen vehicle by Vaden, either McCollum or petitioner Jenkins would contact co-conspirator Wharton, also a government witness, who handled the preparation of false New York registration of the car (Tr. 686-706, 732-770, 1079-1120a). Vaden would deliver the vehicle to the out-of-state purchaser (Tr. 150-172).

During the month of October 1970, two 1970 Lincoln Continental cars were stolen in New York City (Tr. 2206-2208, 2504). Vaden delivered these cars to petitioner Burns in New Jersey. Both of them had broken ignition switches and had to be started by using a screwdriver (Tr. 109-144). Burns complained to Jenkins, who relayed the message to Wharton, that one of the Lincolns did not have a bogus plate to match the identification number on the registration supplied with the car (Tr. 753-754). A New Jersey state policeman located and seized one of these cars in New Jersey. Burns told the officer she bought the car for $4000 from a named party in New York (Tr. 2343-2350). The second Lincoln, which the officer had observed in Burns' driveway, was later seized at the residence of Burns' son (Tr. 2356-2361).

Burns received concurrent sentences of imprisonment for eighteen months, pursuant to 18 U.S.C. 4208(a)(1) on six substantive counts, sentence to be suspended on all but sixty days; in addition to which she was placed on probation for sixteen months.

Wyche received a suspended sentence for conspiracy and was placed on probation for one year.

Several circumstances inculpated petitioner Wyche in the conspiracy:

(a) In February 1971, Vaden stole a white Lincoln for McCollum. About a week later, Vaden went with McCollum, Wyche, and Wharton to where the Lincoln was parked and made an unsuccessful effort to get it started (Tr. 218-224).

(b) Defendant Grissett testified that he learned from McCollum in the summer of 1970 that McCollum dealt in "hot" cars and arranged to buy a white Lincoln Continental from him. He thereafter went with McCollum to Wyche's home (Tr. 536-542). Grissett, a resident of Washington, D.C., returned to New York shortly thereafter, meeting McCollum and Jenkins at Wyche's house. Arrangements were made to obtain a New York registration certificate and an affidavit of sale for the Lincoln. He stayed that night at Wyche's house (Tr. 587-593).

(c) In March 1971, Wharton and McCollum agreed to transport a stolen 1970 Cadillac from New York to North Carolina (Tr. 1119-1120). They met with two other parties at Wyche's home and talked about the trip in Wyche's presence. McCollum obtained from Wyche the keys to her garage and, with her consent, transferred the tags from her car to the stolen car (Tr. 1408-1410).

ARGUMENT

1. After the jury had returned its verdict finding McCollum, Jenkins and Burns guilty, *inter alia,* of transporting interstate falsely made securities, in violation of 18 U.S.C. 2314, but before sentencing, the Court of Appeals for the Second Circuit held in another case that New York State motor vehicle registration certificates were not securities within the meaning of

this statute. *United States* v. *Canton,* 470 F. 2d 861. Accordingly, the district court dismissed the counts involving the registration certificates and imposed sentences solely as to the remaining counts upon which a verdict of guilty had been returned.

Petitioners in No. 73-186 and No. 73-5179 urge that in these circumstances consideration by the jury of the evidence relating particularly to these counts was prejudicial. The short answer is that such evidence would have been admissible in any event at this trial. All the "securities" counts, with the exception of counts 21, 22, and 24, related to the obtaining of fraudulent registrations for vehicles whose interstate transportation (or receipt or concealment after such transportation) was alleged in other counts of the indictment (Tr. 2924-2937). Such evidence was therefore relevant to show knowledge and intent as to the related "car" counts. Cf. *United States* v. *Berlin,* 472 F. 2d 1002, 1009 (C.A. 2). As to counts 21, 22, and 24, the evidence was admissible to show knowledge, intent, common scheme or plan by unlawful acts of similar nature, especially in view of the close relationship in time and place. See, *e.g., United States* v. *Payne,* 467 F. 2d 828 (C.A. 5). As to these three counts, which applied only to McCollum, it may be added that the evidence of guilt on the part of this petitioner was overwhelming (*supra,* pp. 3-4).[2]

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[2] The factual situations in the cases upon which petitioners rely were quite different from that here presented. *United States* v. *Roach,* 321 F. 2d 1 (C.A. 3), a bank robbery case, involved an aggregation of errors. The court held, under *Milanovich* v. *United States,* 365 U.S. 551, that the conceded impropriety in instructing the jury on one of the counts constituted one of the several reasons for requiring a new trial. *United States* v. *Calhoun,* 257 F. 2d 673 (C.A. 7), involved reception of a large volume of evidence against all defendants which was admissible only upon a theory of conspiracy, but the charge of conspiracy was fatally defective because it omitted the essential element of

2. Petitioners in No. 73-185 and No. 73-186, relying on *Kotteakos* v. *United States,* 328 U.S. 750, argue that the evidence established separate conspiracies. In *Kotteakos* it was held that the evidence showed eight or more separate and distinct conspiracies, the only nexus among them being that one man participated in them all. Such is not the case here.

In this case there was a pattern of criminal activity with McCollum and Jenkins as the ringleaders (*supra,* p. 3). The participation of Anna Burns and Annie Louise Wyche, while of less importance, was central to this activity. The relationship of other defendants who did not appeal, their acquaintanceship with the other parties or their knowledge of the purposes of the scheme is of no significance so far as these petitioners are concerned. Cf. *Blumenthal* v. *United States,* 332 U.S. 539. With respect to petitioner Burns, who places particular emphasis on this contention, the evidence of her guilt under the substantive counts was overwhelming and the light sentence imposed was concurrent as to all counts—both substantive and conspiracy. Accordingly, this Court need not consider contentions relating to the conspiracy count. See *Barnes* v. *United States,* No. 72-5443, decided June 18, 1973, slip op. 8-9, n. 11.

3. Petitioner Burns urges, without identifying any particular part of the charge, that the court "failed to

scienter. In *Cross* v. *United States,* 335 F. 2d 987 (C.A. D.C.), charges of robbing a church rectory and of robbing a tourist home some two and a half months later were tried together, over the protests of one defendant, who wished to remain silent as to one charge but to testify as to the other. When separate trials were denied, this defendant testified as to both charges, winning acquittal on the one as to which he wished to testify, but apparently hurting himself and his co-defendant on the charge as to which he remained silent. A new trial was ordered as to both defendants. The distinguishing feature about the present case is that the evidence received having particular relevance to the "securities" counts was, for the reasons above stated, also relevant and entirely proper as to the "car" counts, so that petitioners were in no way prejudiced.

instruct the jury that in order to convict the defendants of conspiracy, they must have found beyond a reasonable doubt that the defendants knew that the allegedly stolen automobiles had traveled in interstate commerce" (Burns Pet. 7). No such objection was made at trial. Moreover, the court gave such an instruction (Tr. 2921, 2930, 2931, 2937-2938, 2939, 2940, 2942). There was no error, much less plain error.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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